Petition

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81-1366

No.

___ October Term, 1981

In the Supreme Court of the United States

LOWELL R. DOWNING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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January 13, 1982

Financial Press Corporation, Pittsburgh

QUESTION PRESENTED

WHETHER A DEFENDANT IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DOES NOT KNOW THE ELEMENTS OF THE CRIME WITH WHICH DEFENDANT IS CHARGED AND CALLS THAT DEFENDANT TO TESTIFY IN HIS OWN BEHALF AND HAS HIM ADMIT ALL OF THE ELEMENTS OF THE CRIME.

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No.

___ October Term, 1981

In the Supreme Court of the United States

LOWELL R. DOWNING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

Lowell R. Downing, petitioner herein, prays this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 16, 1981.

OPINIONS BELOW

The Judgment order, without published opinion, of the Court of Appeals is set forth in Appendix A. The order of the Court of Appeals denying rehearing is set forth in Appendix B. The opinion of the district court is officially reported in 496 F. Supp. 1068 and is set forth in Appendix C. The judgment order of the Court of Appeals in the direct appeal at No. 78-2689 is set forth in Appendix D and is reported, without published opinion, in 615 F. 2d. 1354.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1981. Downing's timely petition for rehearing was denied on October 16, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Lowell Downing (hereinafter Downing) began this action by filing a motion to vacate a sentence of imprisonment imposed after a jury trial. At the time of filing, he was at large

on bond[1] and thus restrained of liberty. Jurisdiction was alleged pursuant to 28 U.S.C. §2255.

Downing was indicted on a charge of unlawfully distributing and possessing with intent to deliver a quantity of cocaine, a violation of 21 U.S.C. §841 (a)(1).

First, he entered a plea of guilty to the indictment stating, *inter alia*, that he was, in fact and law, guilty.

Before sentencing, however, he retained new counsel who asked the district court to permit the plea to be withdrawn. New counsel, who was trial counsel, asserted that Downing had a valid defense. The district court permitted the withdrawal of the plea and directed that the case go to trial before a jury.

In the jury trial Downing took the stand on his own behalf. On direct examination and cross-examination he testified 1) that he possessed cocaine, 2) that he knew it was cocaine before he delivered it to another person and 3) that he delivered it to another person. He asserted that he was acting as a friendly courier for another person.

The jury, not surprisingly, found Downing guilty. He was sentenced to a term of imprisonment on the same day.

Thereafter, trial counsel for Downing filed Notice of Appeal to the United States Court of Appeals for the Third Circuit. When the appeal was not perfected by trial counsel, Downing retained new counsel to perfect the appeal.

The sole issue before the Third Circuit was the ineffectiveness of trial counsel.[2] That court entered a judgment order, affirming the judgment of sentence "without prejudice to appellant's presenting the incompetence of counsel issue before

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[1]The post-trial bond has been continued by the district court throughout this collateral proceeding.

[2]Downing asked the Third Circuit to remand the case for an evidentiary hearing on the ineffectiveness of counsel. This was denied "without prejudice to file petition for habeas corpus."

the District Court in a 28 U.S.C. §2255 proceeding." (Appendix D, *infra*, 10a-11a)

Downing then filed the "28 U.S.C. §2255 proceeding" in which he moved to vacate the sentence because he had been denied the effective assistance of counsel. The district court granted a hearing on the motion.

It was at this hearing that trial counsel testified that when he asked that Downing's plea of guilty be withdrawn he knew that Downing possessed cocaine, knew it was cocaine that he possessed and delivered cocaine to another person. Trial counsel planned, even then, to have Downing testify to all of these matters but to claim that he was acting as a friendly courier.

Trial counsel admitted that at no time did he know, as a matter of law, that for Downing to take the stand and to testify to these elements was to confess to the offense charged. He, nevertheless, elicited the confession from his client in the trial.

The district court concluded that the representation by trial counsel was not a farce, a sham or a mockery of justice, but within the range of normal competency. (Appendix C, *infra*, at 5a-9a). The motion to vacate sentence was denied.

Downing appealed this order to the Third Circuit which affirmed the district court. This was by a judgment order which stated that Downing had not shown that the claimed incompetency resulted in prejudice in the sentencing. (Appendix A, *infra*, at 2a-3a)

Downing's timely petition for rehearing before the original panel was denied on October 16, 1981. (Appendix B, *infra*, at 4a-5a)

REASONS FOR GRANTING THE WRIT

1. There is confusion and conflict among the circuits about the standards to be followed in passing on claims of ineffective assistance of counsel.

This Court should grant this petition because the Court of Appeals has decided an important question of constitutional law in a manner which conflicts with the holdings of other courts of appeals and which reflects the confusion of the courts of appeals which have considered claims of ineffective assistance of counsel.

A. The Constitutional Right to Effective Assistance of Counsel and the Holdings of this Court.

The Sixth Amendment to the Constitution of the United States provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

This Court has concluded that "[i]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The guarantee of assistance of counsel, thus, means effective or adequate assistance of counsel.

Before *McMann v. Richardson, supra*, most courts of appeals, followed to some extent, at least, the so-called farce and mockery of justice standard for judging claims of ineffective assistance of counsel. Basically, it was necessary to find that the defendant was "practically without representation" in the trial. *United States ex rel. Darcy v. Handy*, 203 F 2d. 407 (3d Cir. 1953).

In *McMann*, however, this Court directed the courts toward a new test: was the representation within the range of

competence demanded of attorneys in criminal cases? *McMann v. Richardson, supra*, at 771.

The same test was applied in *Tollett v. Henderson*, 411 U.S. 258 (1973). In both cases, this Court rejected the view that a defendant was entitled to representation free from any error.

Beyond these general tests, however, the task of defining more specifically the standards of adequate representation by counsel has been relegated to the lower courts. The situation was described by the Eighth Circuit:

> "The Supreme Court has never enunciated any clear standards for courts to follow in passing on claims of ineffective assistance of counsel. As a result, circuit courts, left without guidance, have groped for the correct prescription to apply." *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974).

B. The Holdings of the Third Circuit and the Other Circuits.

After the decision of this Court in *McMann v. Richardson*, the Third Circuit adopted a new standard for judging competency of counsel in *Moore v. United States*, 432 F.2d 730, 736 (1970):

> "[T]he standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."

It thus abandoned the farce and mockery test it used in *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953).

By now, almost all circuits have abandoned the farce and mockery test though the language of the newly adopted tests varies from court to court. The Fifth and Sixth Circuits inquire whether counsel was reasonably likely to render and was rendering reasonably effective assistance. *Haggard v. Alabama*, 550

F.2d 1019 (5th Cir. 1977); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). The Seventh Circuit uses language similar to that of the Third: did counsel meet the minimum standard of professional representation? *United States ex rel. Ortiz v. Sielaff*, 542 F.2d 377 (7th Cir. 1976). The Eighth Circuit speaks of the customary skills and diligence of a reasonably competent attorney. *United States v. Bad Cob*, 560 F.2d 877 (8th Cir. 1977).

In sum, the acceptance of the new standard by the Circuits is simple; the application of the standard, however, creates problems that may require the attention of this Court.

C. The Area of Conflict Among the Circuits.

In its judgment order the Third Circuit adopted the requirement that a defendant show that he was prejudiced by the incompetency of his counsel. This, it said, stems from its holding in *United States ex rel. Green v. Rundle*, 434 F.2d 112 (3d Cir. 1970).

The Third Circuit, therefore, seems to interpret the guidance of this Court *McMann v. Richardson, supra* and *Tollett v. Henderson, supra*, as requiring a finding of incompetence and then requiring a finding that the defendant was prejudiced by the incompetence.

This is, in effect, a statement of the harmless error doctrine as developed by this Court in *Fahy v. Connecticut*, 37 U.S. 85 (1963) and *Chapman v. California*, 386 U.S. 18 (1967).

Several other circuits have created a requirement similar to that relied upon by the Third Circuit here: *United States v. Bosch*, 584 F.2d 1113 (1st Cir. 1978); *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968); *Haggard v. Alabama*, 550 F.2d 1019 (5th Cir. 1977); *United States v. Bad Cob*, 560 F.2d 877 (8th Cir.

1977); and *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1979).[3]

The better view and the view, we believe, this Court has adopted is the view of the Sixth and Ninth Circuits. Both conclude that harmless error tests do not apply in regard to deprivation of a procedural right so fundamental as effective assistance of counsel. *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977).

2. The decision of the Third Circuit is contrary to decisions of this Court.

This Court never created nor suggested the creation of the two step test for ineffectiveness of counsel adopted by the Third Circuit.

As early as *Glasser v. United States*, 315 U.S. 60 (1942), this Court announced:

> "The right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 76.

The principle stated there was, of course, before the development of the harmless error doctrine.

The Third Circuit may have ignored the *Glasser* principle because of that newer development. If so, we suggest, it erred.

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[3]Though the Fourth Circuit requires a showing of prejudice, it places the burden on the prosecution to present affirmative proof of lack of prejudice: *Coles v. Peyton, supra.* The District of Columbia Circuit in *DeCoster I, United States v. DeCoster*, 487 F.2d 1197 (1973) placed the burden on the prosecution to show that defendant was not prejudiced. In *DeCoster III, United States v. DeCoster*, 624 F.2d 196 (1979) that court placed the burden of proving prejudice on the defendant. That a burden of proof issue becomes important in these circuits demonstrates some of the pitfalls involved when the harmless error rule is used in assistance of counsel cases.

Six years ago, this Court had an opportunity to apply the harmless error doctrine to an assistance of counsel case. It rejected the opportunity. In *Geders v. United States*, 425 U.S. 80 (1976), this Court concluded there was a denial of the assistance of counsel in violation of the Sixth Amendment though the Court of Appeals for the Fifth Circuit[4] had ruled that since the defendant did not *claim* that prejudice resulted from the denial, he could not prevail.

This Court reversed that ruling because the orders of the trial court impinged upon defendant's right to assistance of counsel.

The decision of the Third Circuit obviously is not consonant with this Court's decision; nor, indeed, does it accord to the fundamental right to assistance of counsel the status this Court has consistently insisted upon.

3. Counsel was grossly incompetent because he was ignorant of the clearly established law.

Jailhouse lawyers and scholars alike list many examples of intrinsic incompetency.[5] Courts which have sifted through such examples have developed a standard which denies constitutional protection in those cases in which the error claimed is esoteric or discovered only by tedious analysis. Thus, in *Tollett v. Henderson, supra*, defendant was not denied effective assistance of counsel when his lawyer did not attack the racial make-up of an indicting grand jury long before such a problem had received regular and well-known judicial attention. At worst, counsel made an error of judgment—by hindsight.

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[4]This is one of the circuits adopting the harmless error doctrine, *supra*, pp. 11-12.

[5]Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289 (1964).

Where, however, counsel does not even know the elements of the crime, there is a default of judgment: he is unable, because of his ignorance, to make any judgment at all. *Brubaker v. Dickson*, 310 F.2d 30, 39 (9th Cir. 1962).

Here, trial counsel admitted that he did not know that his client was confessing to each of the elements of the crime when he permitted him to testify that he possessed cocaine, knew it was cocaine and delivered it to another person. Such knowledge could have been gained by reading the annotations to the statute involved. Opening one book would have avoided the error.

The genus of error here is the same as in *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976) and *United States v. Bosch*, 584 F.2d 1113 (1st Cir. 1978).[6] In the former, for example, counsel did not know the elements of the crime of interstate transportation of vehicles. Because of his ignorance and in good faith, he permitted his client to confess at a preliminary hearing to each of the elements of the crime.

In federal criminal trial manuals, knowing and discussing with the client the elements of the crime charged is one of the first items on the agenda of an advocate. In at least one district the elementary importance of this knowledge is shown in the check list for lawyers:

> "C. Check List
>
> "1. Written appearance of counsel (filed)
>
> "2. Explained elements of crime to defendant."[7]

Knowing the elements of the crime is also a general duty of the lawyer. This fundamental obligation is set forth in *ABA Standards, The Defense Function*, §5.1 Commentary a:

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[6]*See*, also, *People v. Ibarra*, 34 Cal. Rptr. 863 (1963) and *In re Williams*, 81 Cal. Rptr. 784 (1969).

[7]Plan for District Court of Maryland Pursuant to Criminal Justice Act of 1964, 36 F.R.D. 277, 339 (1965).

> The lawyer's duty to inform himself on the law is equally and often more important [than investigating fully the facts]; although the client may sometimes be capable of assisting in the fact investigation, he is not educated in or familiar with controlling law. The responsibility to know the law which the lawyer bears is a heavy one. . . .
>
> Here, the burden was never borne.

4. The issue involved is important to the effective administration of criminal justice and, therefore, warrants review at this time.

Incompetency of counsel is a recurring theme in hearings before our courts as well as in speeches and articles by jurists, leaders of the bar and law professors. Many have urged specialized training and certification of lawyers, akin to the processes of the medical profession.[8] Such efforts, it is hoped, will protect and improve the system of justice. At the same time, our courts should be relieved from the inundation of claims of ineffective assistance of counsel—many of which are frivolous.

We must recognize, that "whenever defense counsel renders ineffective assistance, it is a disgrace to our system of justice, a system which promises a fair trial to all defendants." Finer, *supra,* 58 Cornell L. Rev. at 1116.

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[8]See, *e.g.* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L. Rev. 227 (1973); Finer, *Ineffective Assistance of Counsel,* 58 Cornell L. Rev. 1977 (1973).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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LOWELL R. DOWNING

No.

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In the Supreme Court of the United States

LOWELL R. DOWNING,
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v.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appendix A— Judgment Order of the Court of Appeals, September 15, 1981
Appendix B— Order Denying Petition for Rehearing, October 16, 1981
Appendix C— Opinion of the District Court, July 10, 1980
Appendix D— Judgment Order of the Court of Appeals, February 15, 1980

APPENDIX A

Judgment Order of the Court of Appeals

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-2120

UNITED STATES OF AMERICA

v.

LOWELL R. DOWNING,
Appellant

(D.C. Crim. No. 78-00082)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
September 15, 1981
Before: GIBBONS and HUNTER, *Circuit Judges*
and GERRY, *District Judge**

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*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT ORDER

Lowell Downing appeals from the denial of his motion under 28 U.S.C. § 2255 to vacate his sentence for ineffective assistance of counsel, in that when he moved to withdraw a guilty plea, went to trial, and testified, his counsel did not know the elements of the offense. Downing concedes that the only available relief would be reinstatement of his guilty plea. He has not shown that the claimed incompetency of counsel resulted in prejudice to him in sentencing. *See United States ex. rel. Green v. Rundle,* 434 F.2d 112 (3d Cir. 1970).

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

BY THE COURT,

/s/ JOHN J. GIBBONS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Sally Mrvos, Clerk

APPENDIX B

Order Denying Petition for Rehearing

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-2120

UNITED STATES OF AMERICA

v.

LOWELL R. DOWNING,

Appellant

(D.C. Crim. No. 78-00082)

Before: GIBBONS and HUNTER, *Circuit Judges*
and GERRY, *District Judge**

Upon consideration of the petition for rehearing by petitioner before the original panel,

It is ORDERED that the petition for rehearing before the original panel is denied.

By the Court,

/s/ JOHN J. GIBBONS
Circuit Judge

Dated: October 16, 1981

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*Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX C
Opinion of the District Court

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. Criminal No. 78-82-2

LOWELL R. DOWNING

MEMORANDUM

Lowell Downing, by his attorney, has presented a "Motion to Vacate Sentence" alleging ineffective assistance of counsel. Downing was convicted by a jury on November 17, 1978 at Criminal No. 78-82-2 for violating § 841(a)(1), Title 18 U.S.C.A., i.e., for unlawfully distributing and possessing with intent to distribute a quantity of cocaine. The evidence in support of conviction was overwhelming. A sentence of a $2,000 fine and imprisonment for eight years, and a special parole term of three years, was imposed.

On appeal, the conviction was affirmed on February 15, 1980. *United States v. Downing*, 615 F.2d 1354.

An evidentiary hearing on the Motion to Vacate Sentence was held on May 7, 1980. Downing has been at liberty upon posting a $25,000 surety bond.

In view of Downing's insistence upon a jury trial despite his admission of the facts implicating him, in our opinion the Motion to vacate because of ineffective assistance of counsel should be denied.

From the record and testimony at the hearing, the court makes the following findings of fact and conclusions of law:

After his arrest, Downing retained Attorney Larry P. Gaitens to represent him. A trial was fixed for June 27, 1978

and a jury was selected. Thereupon, Downing changed his plea from not guilty to guilty. The reason he gave was that he did not want to be sent to prison. Attorney Gaitens had advised him that if found guilty, he would likely be sentenced to prison, but if he pleaded guilty and agreed to cooperate with the prosecution a plea agreement might be obtained with a recommendation for probation. The prosecution was convinced from out-of-court statements made by Downing and his co-defendant Robert Solomon that Downing was an active distributor of cocaine and Solomon was one of his agents. Downing told the law enforcement officers that his supply of cocaine was from "Mexican brothers" in New York named Riccord or Rico.

After consultation between Attorney Gaitens and the prosecution, a plea agreement was entered into that if Downing would cooperate and make contact with Rico in New York and purchase cocaine in cooperation with a D.E.A. undercover agent, the prosecution would recommend probation.

Accordingly, the sentencing date was delayed until October 10, 1978 to enable Downing to perform his agreement of cooperation. However, Downing changed his mind and refused to cooperate. No reason was given, but without doubt the proposed cooperation would have been dangerous.

Since he refused to cooperate, Downing thereupon wanted a trial by jury and retained Attorney J. Roi Jones to request the court to withdraw his plea of guilty. Attorney Gaitens withdrew his appearance. A hearing was held on October 19, 1978. At the hearing, Downing emphasized he had a "valid defense" and the court granted his motion to withdraw his plea of guilty. Trial was fixed for November 15, 1978.

As heretofore stated, at the subsequent trial Downing was convicted, appealed and now moves to va[illegible]te the sentence and re-enter his plea of guilty on the ground that his trial attorney Jones provided ineffective assistance.

The decision to withdraw his plea of guilty and stand trial was an independent decision on the part of Downing when he declined to perform the agreed-upon cooperation with the D.E.A. agents. He emphasized to the court he had a valid defense which he did not disclose to the court or to the prosecution. At the trial Downing and his counsel tried to convince the jury that Downing was merely trying to do a favor for his friend, Solomon, by going to a certain house, receiving a bag for Solomon containing marijuana, and delivering it to Solomon. However, when Downing opened the bag to make a marijuana "joint"[1] he was surprised that the contents were cocaine. Later he delivered the cocaine to Solomon who sold it to undercover agents for $1,600, of which $1,200 was given to Downing.[2]

Attorney Jones did his best in the cross-examination of the prosecution witnesses and of Solomon, who had pleaded guilty and testified for the prosecution. He tried hard to persuade the jury that Downing did not have a specific intent to violate the law, but was innocently helping a friend, Solomon, who misled him into believing he was obtaining a bag of marijuana for delivery to Solomon.

The court concludes that despite the difficult circumstances, in aid of his client's desire to avoid imprisonment, Attorney Jones exercised the customary skill and knowledge which normally prevailed in the Western District of Pennsylvania in 1978. *Moore v. United States,* 432 F.2d 730 (3d Cir. 1970); United v. Fletcher Williams, F.2d (3d Cir. 1980). He was an experienced criminal lawyer practicing in the Pennsylvania courts since 1972. In no event can it be found that he was inefficient or incompetent in failing to recommend to Downing that he should not testify. Downing's only hope of acquittal, in view of the overwhelming evidence against him,

1. Trial transcript p. 218.

2. Trial transcript pp. 43-44, 66-67, 127, 233-234.

was to convince the jury by his testimony that he was innocently doing his friend Solomon a favor, and did not knowingly take possession of cocaine, thus minimizing his role in possessing and delivering the drug, and thereby gain the sympathy of the jury. *Cf. United States ex rel. Tillman v. Alldredge*, 350 F. Supp. 189, 196 (E.D. Pa. 1972).

Attorney Jones did not persuade Downing to withdraw his plea of guilty. This decision was independently made by Downing after refusing to cooperate with the prosecution.

After he refused to cooperate, despite his obvious guilt, Downing insisted upon a jury trial because he "thought he could win." Lawyers who undertake a jury trial on behalf of a guilty client are not to be adjudged ineffective or incompetent when the verdict is guilty. Juries sometimes do acquit defendants despite the fact that they are guilty.

In no event can it be found from the facts that the trial was a farce, a sham, or a mockery of justice. The trial did not shock the conscience of this court.

The burden on Downing to establish a claim of ineffective assistance of counsel is heavy, and neither hindsight nor success is the measure. *United States ex rel. Turner v. Cuyler*, 443 F. Supp. 263 (E.D. Pa. 1977), aff'd 595 F.2d 1215 (3d Cir. 1979); *United States v. Hines*, 470 F.2d 225 (3d Cir. 1972); *United States v. Varga*, 449 F.2d 1280 (3d Cir. 1971). It does not mean victorious or errorless counsel. *Brady v. United States*, 433 F.2d 924 (10 Cir. 1970); *United States ex rel. Turner v. Cuyler, supra.*

Because the defense is unsuccessful, and because Downing concludes his attorney did not meet his standards of effectiveness does not destroy the essential integrity of the proceedings nor constitute a denial of due process. From the evidence, it appears that Downing independently determined that in order to escape jail he must withdraw his pleas of guilty and stand

trial, believing he would be acquitted. From the record, it appears that Downing was a difficult client in a difficult case, and it is doubtful that any counsel could have satisfied his personal standards of effectiveness, i.e., acquittal.

Much can be said of alleged errors made during a trial. Monday morning quarter-backing is not only popular among sports fans; but we often hear it at the bar. The Constitution does not guarantee a perfect trial by a perfect defense counsel. On balance, we think the representation of Downing by Attorney Jones was fair and as effective as possible in the face of the adverse circumstances; his services were well within the range of normal competency.

An appropriate order denying the Motion to Vacate Sentence will be entered.

July 10, 1980

/s/ RABE F. MARSH
United States District Judge

cc: Sandra Jordan, Esq.
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APPENDIX D

Judgment Order of the Court of Appeals

United States Court of Appeals

For The Third Circuit

No. 78-2689

UNITED STATES OF AMERICA

vs.

DOWNING, LOWELL R.
Lowell Downing,
Appellant

Appeal From The United States District Court
For The Western District Of Pennsylvania
(D.C. Crim. No. 78-00082-02)

Submitted Under Third Circuit Rule 12(6)
February 15, 1980
Before: ALDISERT, WEIS and
HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the conduct of the trial was so far below the standard of normal competency that the judgment must be reversed; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed without prejudice to appellant's presenting the incompetency of counsel issue

before the district court in a 28 U.S.C. § 2255 proceeding. *See United States v. Schreiber,* 599 F.2d 534, 538 (3d Cir.), *cert. denied,* 48 U.S.L.W. 3219 (1979); *United States v. Garcia,* 544 F.2d 681, 684 n.1 (3d Cir. 1976).

BY THE COURT,

/s/ ALDISERT
Circuit Judge

Attest:

/s/ THOMAS F. QUINN
Thomas F. Quinn, Clerk.

DATED: FEB 15, 1980